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Nos. 83-1321, 83-1432, 83-1433,
83-1442, 83-1443 & 83-1618

In the Supreme Court of the United States

October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,

Petitioners,

v.

TENNECO OIL COMPANY, *et al.*,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

SUPPLEMENTAL MEMORANDUM OF PETITIONERS IN NOS. 83-1432 & 83-1433

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SUPPLEMENTAL MEMORANDUM OF PETITIONERS IN NOS. 83-1432 & 83-1433

Petitioners in Nos. 83-1432 and 83-1433, which include Northwest Pipeline Corporation (Northwest) and the distribution companies and state commissions in Northwest's market area, submit this Supplemental Memorandum pursuant to the instruction from the Clerk of this Court by letter to counsel dated May 31, 1984.

The Court's interest in Supplemental Memoranda resulted from the filing of a Joint Supplemental Brief by Petitioner El Paso Natural Gas Company (El Paso) and Respondents Tenneco Oil Company (Tenneco) and Conoco, Inc. (Conoco), which might have been read to suggest that a proposed settlement between them filed with the Federal Energy Regulatory Commisson (the Commission) on May 18, 1984, had diminished the need for this Court's review. Any such inference is unwarranted.

In contrast to the Commission approved settlement between Northwest and Phillips Petroleum Company (Phillips), which contemplated the possibility that the GLA/PLA lease sale agreements would be finally determined to be jurisdictional sales, the circumstances and content of the proposed El Paso settlement with Tenneco and Conoco reveal that it was negotiated on the assumption that the Fifth Circuit's decision would not be overturned (as demonstrated by the fact that Tenneco and Conoco agree to be bound even if certiorari is denied.) It appears that the parties structured this agreement with the expectation of Commission approval after a final non-jurisdictional decision and a showing of dire and unavoidable consequences to El Paso. From this it is fair to say that (1) under the proposed settlement, Tenneco and Conoco expect to obtain revenues at least equal to those that they are now receiving; (2) the proposed settlement is thus a form of special relief which simply shifts the adverse financial consequences of the excessive special overriding royalties to El Paso customers; (3) the producers' assertions that the ratepayers are

protected in the future from any adverse impacts from the decision below because of this Court's *Mid-Louisiana*[1] decision are baseless; and (4) there is little chance that the Commission will approve the settlement prior to this Court's disposition of the jurisdictional issue and no chance of approval following a jurisdictional determination by this Court.

INTERIM AGREEMENTS

Attempts at settlement by the pipelines and the GLA/PLA producers early in this ten-year litigation achieved no results. This required El Paso and Northwest to execute interim agreements with the producers and pay them their special overriding royalty claims while the district court's decision was appealed and regulatory relief was pursued before the Commission. In these interim agreements, the pipelines reserved the right to pursue the jurisdictional litigation and to pay the producers' claims subject to refund if the GLA/PLA lease sale agreements were ultimately held to be subject to the Commission's jurisdiction under *Rayne Field* and its progeny.[2]

El Paso's interim agreement required it to pay the GLA producers for all gas at the Commission's new gas price, which later became the Natural Gas Policy Act of

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[1] Public Service Comm'n v. Mid-Louisiana Gas Co., 103 S.Ct. 3024 (1983).

[2] United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392 (1965) ("Rayne Field"); FPC v. Pan American Petroleum Corp., 381 U.S. 762 (1965) ("Bastian Bay"); Continental Oil Co. v. FPC, 370 F.2d 57 (5th Cir. 1966), cert. denied, 388 U.S. 910 (1967) ("Ship Shoal").

1978 (NGPA) Section 102 price, less 7¢, with annual price redeterminations. El Paso has made these payments effective from 1974 to the present. El Paso's special overriding royalty payment is now $3.75 per Mcf and will increase to $4.00 per Mcf on July 1, 1984. In addition, the GLA producers receive one-third of the net plant liquid revenues obtained from processing the GLA gas volumes in accordance with the original GLA agreements.

Northwest's interim agreements, on the other hand, did not require any liquid payments to the PLA producers. Under both the original PLA agreements and the interim agreements, Northwest retained 100 percent of the liquid revenues which have been credited over the years to its cost of service for the benefit of its customers. Northwest's interim special overriding royalty payment was based on the average of the three highest prices per Mcf in the San Juan Basin, less 5¢. Northwest's interim agreements expired on October 1, 1982, and Northwest refused to extend them. Since that date, Northwest has paid the PLA producers applicable NGPA prices for the gas less its cost of service and thus has incurred a substantial contingent liability to PLA producers' for their special overriding royalty claims in excess of these payments.

THE NORTHWEST-PHILLIPS SETTLEMENT

The Commission's jurisdictional decision of September 25, 1980, ordered further remedy proceedings to determine:

> (1) whether and if so to what extent were the payments made by El Paso, Northwest, and PNW to the overriding royalty owners excessive and there-

> for unlawful, (2) what if any amounts should be required to be refunded by the royalty owners to El Paso and Northwest and flowed through by them to their jurisdictional customers, and (3) what level of royalties should be approved for the future. (App. 30a.)

In February 1981, El Paso and Northwest filed testimony and exhibits reflecting their proposed remedies consistent with the remedy in *Rayne Field*.[3] They called for the pipelines' cost of service (including production costs, taxes, landowner royalties and return) expressed in terms of a cost per Mcf to be deducted from applicable NGPA gas prices with the remaining value paid to the GLA/PLA producers as their special overriding royalty and all other aspects of the GLA/PLA agreements remaining unchanged. The pipelines claimed that the GLA/PLA producers had been overpaid since 1974 and, therefore, substantial refunds from each of them, totalling about $1 billion, were owing to the pipelines' customers.

In January 1983, the GLA/PLA producers filed their responding testimony and exhibits contesting every aspect of the pipelines' remedy cases. The producers contended that September 25, 1980, the date of the Commission's jurisdictional decision, was the beginning date for any remedy and that the pipelines had underpaid the special overriding royalties since that date so that no refunds were due. They claimed the right to receive all of the proceeds from the liquid revenues realized from

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[3] See Public Service Comm'n v. FPC, 543 F.2d 757 (D.C. Cir. 1974), cert. denied, 424 U.S. 910 (1976).

processing the GLA/PLA natural gas volumes. They also claimed that the NGPA Section 109 ceiling price, rather than the much lower Section 104 replacement contract price utilized by the pipelines, was the minimum price for GLA/PLA gas, with higher prices owing for Section 103 and Section 108 volumes.

In early 1981, Northwest and its PLA producers met together to discuss possible settlement. Northwest believed that it could negotiate only what would be supported by its customers and approved by the Commission; and that this required reasonable future gas prices and significant refunds for its customers. No progress was achieved, but Phillips subsequently indicated that it would be willing to try to negotiate a settlement alone within Northwest's stated negotiating parameters if refund claims were substantially compromised. After two years of negotiations and discussions by Northwest with its distribution customers and state commissions, Phillips and Northwest concluded a settlement in May 1983.

In essence, this settlement provided that, irrespective of the outcome of the jurisdictional litigation, Phillips would accept Northwest's proposed remedy for the future and would not receive any liquid revenues. In return, Phillips would have to pay refunds based on the applicable NGPA pricing categories only for the period after September 25, 1980. Refunds accruing after that date and calculated in this manner totalled about $30 million. This settlement was contingent upon Commission approval and could be voided by either party following a Fifth Circuit decision on the jurisdictional question if the

decision was rendered prior to final Commission approval. Northwest offered all PLA producers the same settlement it had executed with Phillips, but none of them expressed any interest.[4]

The settlement agreement was filed with the Commission on May 20, 1983, with the support of most of Northwest's customers. Two of Northwest's customers and two of its state commissions, together with the Commission Staff and the California intervenors, opposed the settlement because of dissatisfaction with the refund amount and with its use of the NGPA Section 104 replacement contract rate rather than the lower Section 104 flowing gas rate. These opponents criticized the adequacy of the refund settlement on the strongly asserted belief that the Commission's jurisdictional decision would be affirmed and that the Commission would require much larger refunds. Commission Staff and the California intervenors also voiced opposition because of their concern that Commission approval of the Phillips refund might have adverse precedential effect upon the

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[4] Phillips' willingness to alone accept a jurisdictional settlement may have been due in part to Phillips' major role in providing the principal gas supply for the new Pacific Northwest pipeline 30 years before and assisting its certification with expert testimony on the extensive proven reserves provided by PLA-5. See Petition for Certiorari, No. 83-1432, at 9. In reply comments filed with the Commission in support of the settlement, Phillips stated that "[t]he PLA leases were the bedrock of PNW's gas supply at the time of initial pipeline certification . . ." thus, acknowledging that the PLA leases transferred proven gas reserves, not merely a right to explore. Reply Comments of Phillips Petroleum Company to Initial Comments on Offer of Settlement, FERC Docket Nos. CP74-314, et al., dated June 20, 1983, at 10 n.9.

larger refund claims of California consumers against the GLA producers.[5]

Before the Commission could consider the May 1983 Northwest-Phillips settlement as a contested matter, the Fifth Circuit decision was announced and Phillips promptly exercised its right to void the agreement. However, Phillips thereafter expressed a willingness to again settle if certain more favorable terms were included. Another settlement was negotiated and submitted to the Commission for comments and approval on September 8, 1983. This second settlement was, in all critical respects regarding the future, similar to the May 1983 settlement, but contained certain other differences. Again, none of the PLA-5 liquid revenues were to be credited to Phillips and the special overriding royalty payments were to be calculated using values based on the applicable NGPA prices less Northwest's cost of service. The principal difference was the payment of the $30 million refund was to be contingent upon reversal of the Fifth Circuit's decision.[6] However, in a significant concession to Staff's position, Phillips agreed that if Commission

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[5] Northwest's total refund claim against Phillips from 1974 through September 30, 1982, was about $87 million which, with interest, totalled about $143 million. Staff, using Section 104 flowing gas rates, contended the refund was $174 million including $68 million of interest.

[6] Two other provisions, unrelated to PLA-5, were added to the second Northwest-Phillips settlement, but only one had any consumer impact. A gas purchase contract between Phillips and Northwest covering certain acreage in Wyoming was to be amended to grant Phillips 35 percent of the revenues realized by Northwest from liquids attributable to Phillips' production. This new grant would reduce the liquid revenues credited by Northwest to its consumers through reduction of its cost of service by up to $800,000 per year.

jurisdiction was finally upheld and the Commission determined that the NGPA Section 104 flowing gas prices were applicable to PLA production, that such lower rate thereafter would control the payments to Phillips.

All aspects of the Northwest-Phillips settlement and their financial impact on Northwest's customers were fully set forth in the Offer of Settlement filed with the Commission. This time there was no opposition from Northwest's customers and virtually all of the state commissions and distribution companies in Northwest's market area actually joined in the offer. Staff supported this second settlement because of the adverse jurisdictional decision by the Fifth Circuit.[7] The Commission approved this uncontested settlement on November 23, 1983, as on balance fair and reasonable and in the public interest. The Commission added:

> Critical in the balance is the uncertainty of the outcome of further Court review of the former Fifth Circuit's decision concerning the Commission's jurisdiction over the GLA's and PLA's. Phillips is offering to accept rates under PLA-5 that could save Northwest, and eventually its consumers, as much as $50 million a year. In return, Northwest and its consumers will forego the substantial refunds, as much as $120 million, if and when there is a non-appealable decision that

[7] The California intervenors again opposed for the same reasons they had opposed the first settlement. Tenneco, Conoco and other GLA producers opposed but only if the Commission's order of approval did not contain language indicating the approval did not constitute approval of or precedent regarding any principle or issue in this proceeding. The Commission agreed to this restrictive language and treated the settlement as uncontested because the California intervenors were unaffected by the PLA's.

> PLA-5 is subject to the Commission's jurisdiction. In essence, the settlement assures ratepayers secure future rates in return for the giving up of substantial refunds in the event the former Fifth Circuit is reversed. In our opinion, a fair balance has been reached. A factor which suggests that a fair and correct balance in fact has been reached is evidenced by the fact that the California parties believe the settlement too generous to Phillips and the GLA producers assert that they want to receive more than Phillips.[8]

After Commission approval of the Northwest-Phillips settlement, Northwest again offered its basic terms to all other PLA producers. This time, Getty accepted and a similar agreement was executed and approved by the Commission as an uncontested settlement on March 30, 1984. All of the other PLA producers, including Amoco, Arco and Mobil, have remained unwilling to accept a Phillips-type settlement and continue to demand much higher special overriding royalty payments or a more favorable settlement including liquid revenues and no significant refund. Refund claims against these PLA producers are now approximately $60 million with interest. Thus, the potential recovery of refunds for Northwest customers, if this Court reverses the Fifth Circuit, now exceeds $90 million.

THE PROPOSED EL PASO-TENNECO-CONOCO SETTLEMENT

While the principal terms of the Northwest-Phillips settlement were negotiated on the assumption that the

[8] 25 FERC ¶ 61,292, at 61,674.

Commission's jurisdiction may be upheld, the El Paso-Tenneco-Conoco settlement was negotiated on the assumption that the lease sales were non-jurisdictional.[9] El Paso had to negotiate the best agreement it could make with Tenneco and Conoco in the face of extremely adverse circumstances. Absent Commission jurisdiction, El Paso's special overriding royalty payments are subject to rapid escalation and at the present level of $3.75 per Mcf already substantially exceed the NGPA price El Paso can charge its customers for the GLA volumes without special relief. After the Fifth Circuit's non-jurisdiction decision in July 1983, immediately following this Court's *Mid-Louisiana* decision in June, El Paso was forced to try to reassign the GLA leases back to the producers but this was thwarted by a Texas state court decision in February 1984.[10] El Paso only then agreed to the Tenneco/Conoco demands. Significantly, El Paso retained the option to terminate the proposed settlement within 30 days after

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[9] Tenneco and Conoco have the option to terminate the settlement only in the event there is no final approval of it within 15 months after the date of its execution or after 180 days following a final order denying certiorari and they will pay $50 million in refunds even if the non-jurisdictional decision below is sustained.

[10] Union Oil Company conditionally accepted El Paso's reassignment tender and executed a proposed settlement in November, subject to Commission approval, which is now being renegotiated in light of the proposed Tenneco/Conoco settlement. Union, like Tenneco and Conoco, is interested in obtaining the liquid revenues realized from the gas processing and the option of withdrawing for its own account some of the gas volumes. The Union settlement did not address refunds or applicable gas prices and Union continues to seek a Section 109 price, now about $2.40 per Mcf, for old gas. This agreement provided that Union could obtain the same gas purchase agreement with El Paso that might be subsequently negotiated by Tenneco or Conoco. Thus, it is anticipated the renegotiation between El Paso and Union will change their agreement into something very similar to the Tenneco/Conoco settlement.

the date of a final decision of this Court reversing the Fifth Circuit decision if the settlement has not been finally approved by that date.

It is clear that a number of the adversely affected parties, particularly the California Public Utilities Commission,[11] will oppose the settlement, especially in the event that the petitions are granted. Since Tenneco and Conoco have bound themselves for 180 days after this Court's denial of certiorari, there is little question that the Commission will defer judgment on the proposed settlement until this Court has finally acted.

It is apparent that Tenneco and Conoco expect to realize from the proposed settlement revenues at least as great as they would have received under a continuation of El Paso's interim agreement. The proposed settlement's requirement that El Paso pay $2.00 per Mcf for old gas for two years, rather than the Section 104 replacement contract rate of about 90¢ per Mcf, will provide Tenneco and Conoco more than sufficient funds for the $50 million refund. El Paso's customers will more than pay for their refund through this overcharge on old gas.

The major adverse consumer impact, however, will come from all of the liquid revenues that will be lost as credits in reducing El Paso's cost of service for the benefit of its customers. The new processing plant to be built by Tenneco and Conoco and supplied by El Paso

[11] See letter from Janice Kerr, General Counsel, California Public Utilities Comm'n, to Frank Lorson, Chief Deputy Clerk, U.S. Supreme Court, dated May 30, 1984.

will have a capacity of 500 million cubic feet per day and will retire El Paso's present Blanco plant. This new plant will process all of the Tenneco/Conoco GLA volumes as well as all of the volumes from approximately 100 conventional gas contracts under which El Paso now purchases gas from Tenneco and Conoco in the San Juan Basin. (Appendices D-1 and E-1 of the Settlement indicate each producer has about 50 of these contracts with El Paso.) All of these gas volumes have been processed by El Paso in its San Juan Basin plants with two-thirds of the liquid revenues from the GLA volumes and all of the liquid revenues from the contract volumes being applied to the reduction of El Paso's cost of service. If the proposed settlement becomes effective, all of these liquid revenues will go to Tenneco and Conoco and not to the benefit of El Paso's customers. Thus, while the settling parties have not yet provided information quantifying the settlement's adverse cost impact to customers, that impact obviously will be great.[12]

CONCLUSION

The posture of this litigation will significantly affect any Commission public interest determination of the proposed El Paso-Tenneco-Conoco settlement. There is little chance that the Commission will consider the merits of that settlement until this Court has finally acted on these cases, particularly in the face of strong opposition from

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[12] Other obvious adverse customer impacts of the proposed settlement are (i) the potential loss of 25 percent of new gas volumes and (ii) the new plant's deeper stripping of Btu's from old gas which will have to be replaced by Btu's from higher priced new gas.

El Paso's customers. There is no chance that the proposed settlement would be approved if the Fifth Circuit decision is reversed. The very substantial adverse impacts on consumers of the Tenneco/Conoco settlement, the significant consumer benefits of the Phillips and Getty settlements contingent on this Court's reversal of the Fifth Circuit and the large potential adverse consumer impacts from the claims of the other GLA/PLA producers unless restrained by regulation, all demonstrate that this Court's reversal of the erroneous decision below is imperative. The petitions should be granted.

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